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Certificate of Counsel.

I, Sterling Carr, attorney for petitioner, am sensitive to the wisdom of Rule 33 which seeks to limit requests for reconsideration of petitions for the writ of certiorari to the exceptional case. Yet, in this instance, a regard for my obligations as a member of this bar, and therefore an officer of this Court, leave me no alternative.

In the cause I represent justice demands that my client have his day in court and that he be permitted to make his proof as to how, in the exercise of his civil liberties, he was driven from, and was kept from returning to, the trade of his choice. I understand clearly that justice must be done under law; and I am persuaded that, if this Court will but permit a full inquiry, with briefs and oral argument, it will agree that the law does not command the unjust result set down below.

But, heavy as are my obligations to my client, my obligations as a member of the bar of this Court are heavier still. And, in this capacity I would fail in my duty if I did not, on grounds hitherto not advanced, call the Court's attention to the public importance of the unsettled issues of law which this cause presents. For these issues are fundamental, alike to the judicial administration of the antitrust law and to the supervisory office which this Court holds in the federal judicial system. Is our "charter of economic liberty" to be preserved in its vitality? Or is it to be undermined by judicial importation of alien matter into what the Congress has written? Does the legislative outlawing of monopoly and of conspiracy in restraint of trade mean what it says? Or is the law's penalty to be visited only upon those who cannot for a stated period keep their wrongdoing secret? The cause here bristles with a host of just such questions; and these, whatever the standards for review, would seem to be worthy of this Court's attention. For the aforesaid reasons, even apart from my obligation to my client, I would be derelict in my duty if I did not call these imperative questions, not yet clarified in the law, to the attention of this Court.

In this spirit, therefore, I, Sterling Carr, who alone among petitioner's counsel, have had an active part in this cause at every stage, solemnly certify that this petition for rehearing is made in utmost good faith and with no thought of delay; that the grounds upon which it is sought are confined to "intervening circumstances" of "controlling effect" and to "other substantial grounds available to petitioner, although not previously presented"; and that, the petition is restricted to the ground herein specified.

STERLING CARR,
Attorney for Petitioner.

1 Montgomery Street,
San Francisco, Calif.
1 April, 1949.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 513.

BURNHAM CHEMICAL COMPANY, a corporation, *Petitioner*,

v.

BORAX CONSOLIDATED LTD., ET AL., corporations, *Respondents*.

PETITION FOR REHEARING ON PETITION FOR A WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Burnham Chemical Company, in accordance with 33 of the Rules of this Court, respectfully prays for a reconsideration of its petition for certiorari in the above styled case directed to the United States Court of Appeals for the Ninth Circuit, which writ of certiorari was denied to it on March 7, 1949.

Cause of Action and Limitation.

Your petitioner has over a period of years been injured—and continues to be injured—by a conspiracy in restraint of trade secretly formed and secretly executed by the respondents. It was driven out of the borax business in 1929, and every effort it has made to resume operations has been thwarted by the illegal acts of Borax Consolidated and its confederates. The conspiracy to drive all independents from the industry and to assert a world-wide dominion over the borax market has been implemented by a single unified course of concerted action by the defendants. In this course of conduct the last overt act occurred in 1944 when the conspirators succeeded in preventing Burnham Chemical from securing a lease on the Little Placer claim from the Department of the Interior. This ten acre plot would have secured to your petitioner a source of raw material which would at once have allowed its reentry into the borax business. From long before 1929 until 1944 the impact of the conspiracy has fallen heavily upon petitioner.

The only issue thus far considered by the courts below is whether the cause of action is barred by the statutes of limitation. Issue is joined on the law which governs the employment of state statutes of limitations in actions seeking to vindicate rights established by the federal antitrust laws. In particular the combat turns upon the question of when the appropriate statutes begin to run. The so-called "trial on the statute of limitations" at the hands of the district judge was predicated upon three assumptions. The *first* was that the statute should begin to run from "discovery". The *second* was that the action was not allowable if discovery had been made before October 10, 1939. The *third* was that the California three year statute (Code of Civil Procedure, Section 338(1)) was to govern. The date just recited merits a word of explanation. The complaint was filed on July 3, 1945. On October 10, 1942 the Congress

of the United States suspended "the running of any existing statute of limitation applicable to violation of the antitrust laws . . . now indictable or subject to civil proceedings under any existing statutes—"[1] until June 30, 1945. From October 10, 1942 to the date of filing the statute did not run; and, applying the California three-year rule, the court held that the action was barred if discovering occurred prior to October 10, 1939.

The Meaning of Discovery.

The issue, then, turns on the words "discovery"; in particular upon "discovery" of what? The trial court identified discovery with "good cause to believe".[2] Petitioner contended that discovery must be put in terms of knowledge at least sufficient to get the complaint safely past a motion to dismiss. If discovery is to be invoked to toll the statute of limitations, it is robbed of all function unless put in these terms.

Here is the real issue. There is little contention over the facts. Respondents argue that within the period mentioned, petitioner had "good cause to believe". Burnham in his affidavit (R. pp. 131ff) gives a detailed account of his suspicions and of how by their officials he was lulled into a belief in the fair play of the respondents. Petitioner insists that not until 1944 did it acquire the knowledge adequate to the legal standards of an acceptable complaint; and this fact is not contradicted by respondents. And, as the record indicates (R. p. 34), the conspiracy to dominate the world market was so gigantic, and the concert of action was so effectively kept secret that discovery

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[1] Act of October 10, 1942, C. 589, 56 Stat. 781, 77th Cong. 2d Sess. (S. 273, Publ. 740). This Act was extended to June 30, 1946, by the Act of Congress of June 30, 1945 (C. 213, 79th Cong. 1st Sess., § 937, Public 107).

[2] Petitioner's Memorandum in Answer to Briefs by the Respondents, p. 3.

—in the only sense which has any meaning—was far beyond the capacity of the independent business concern. It was only the lucky accident of the seizure of American Potash as German-owned which enabled the Department of Justice, with all its resources, to make a belated discovery. Nor could petitioner before October 10, 1939 have discovered overt acts in the continuing conspiracy which did not occur until after that date, such as the several overt acts by respondents, in attempting to prevent the return of the Burnham Chemical Company to the business through a lease upon the Little Placer claim.[3] If discovery has any part to play in starting the running of the statute, it must be discovery of a legal cause of action. Yet the court below, unconcerned with function, stood by "good cause to believe."[4]

The refusal to put the issue in terms of "knowledge" was the principal allegation of error in the appeal addressed to the Court of Appeals for the Ninth Circuit. Yet that court ignored this issue—from the wrongful decision of which petitioner insists a host of other errors ensued. Instead, oblivious to the three hypotheses upon which the whole trial was predicated, the appeal court lapsed into reading a chosen one (Section 338(1)) among the several state statutes as if it were a part of the federal antitrust law, and of applying it in a literal and mechanical way to the case at hand. A study of the opinion in *Burnham Chemical* v. *Borax Consolidated, Inc. et al*, 170 F. 2d, 569, shows that there is there no ruling on the issue of knowledge against good cause to believe. The function of discovery is overlooked; and the significance of the date Oct. 10, 1939 is not recognized. The rigid application of the three year rule, in disregard alike of the circumstances of the case and of the objectives of the antitrust laws, make the decision a

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[3] See in detail, pp. 8, 9, below.

[4] Memorandum in Reply to Briefs by Respondents, p. 3.

far greater menace to law enforcement than that of the lower court which in form is affirmed.

In the original request for a writ of certiorari, your petitioner limited itself to two questions—the function of the statute of limitations in an antitrust action and the right of the respondents to the plea—which seemed to it to be of vital public importance. It pointed to the need of clarification where at present the law is in conflict or in confusion; and, in spite of the poetic license taken with the cases by respondents, it demonstrated a sharp conflict between the holding below and the line of authority expressed in *American Tobacco Co.* v. *Peoples Tobacco Company*, 204 Fed. 58; *Bailey* v. *Glover*, 21 Wallace 342; and *Holmberg* v. *Armbrecht*, 327 U. S. 392. Its presentation must have been inept; for the conflict of authority and the importance of the question seem to it to admit of no doubt.

Standing to Sue v. Cause of Action.

Yet a number of other different and important grounds are available to petitioner. As pointed out in the brief attached to the original petition, the opinion of the court below[5] is replete with conflicts with holdings of other courts and with departures from the law. Thus it confuses standing to sue, accorded by Section 4 of the Clayton Act (15 U. S. C. § 15) with cause of action accorded by Section 1 of the Sherman Act (15 U. S. C. § 1). The private party has standing because he has been "injured in his business or property". But his cause of action is grounded upon a violation of a substantive provision of the antitrust laws. He can—in fact the tripling of the damage is intended to induce him to—bring the violation of the law to the attention of the courts. The holding below that a private antitrust action is merely "to redress a private injury" and "not (also) for the benefit of the public" (p. 578) is in direct conflict

[5] Petition; by the Burnham Chemical Company, for a Writ of Certiorari....and Brief in Support Thereof, p. 14.

with the very purpose of the triple damage suit as set forth by this court in *Bruce's Juices* v. *American Can. Co.*, 330 U. S. 743, 751-752:

> "Where the interests of individuals or private groups or those who bear a special relation to the prohibition of a statute are identical with the public interest in having a statute enforced, it is not uncommon to permit them to invoke sanctions. This stimulates one set of private interest to combat transgressions by another without resort to governmental enforcement agencies. Such remedies have the advantage of putting back of such statutes a strong and reliable motive for enforcement, which relieves the Government of cost of enforcement. Such private remedies lose, of course, whatever advantage there may be in the presumed disinterested, public interest standards and expertness of a governmental agency which has the initiative control of retributory measures. It is clear Congress intended to use private self-interest as a means of enforcement and to arm injured persons with private means to retribution when it gave to any injured party a private cause of action in which his damages are to be made good three fold, with costs of suit and reasonable attorney's fee."

In a word, whereas one's own injury accords access to the courts and provides a measure for personal damage, it is the intent of the provision to have violations of law harmful to the public brought to the attention of the court. There is no authority for the statement in the opinion below that "the public interest is vindicated (only) by a criminal prosecution."

Typical Errors by the Court Below.

The instant case is of consequence because the enforcement of the antitrust laws is being enfeebled by a host of just such rulings. The opinion below is replete with just such unwarranted concessions which threaten a major surrender. Note, for example in the opinion below, the isolation of the acts through which it is given effect from the

conspiracy in which it is set; the failure to recognize as federal questions the choice between state statutes of limitation and the time when, and the conditions under which, the appropriate statute begins to run; the ruling that the statue cannot be tolled for fraudulent concealment because fraud is not "the gravamen" of an antitrust violation; the ruling that in a triple damage suit the statute begins to run from the performance of each overt act rather than from the last overt act; and the failure to make the allegations in the complaint the frame of reference for any judgment upon the statute of limitation. These, and other rulings of like kind, may not yet have enough authority back of them to be the law of the land. But they do represent a current tendency of federal judges to degrade the antitrust action to mere private law and they do present a threat which if not arrested by this Court is certain to rob the antitrust laws of their vitality and to deflect them from their objective. Surely this Court in its supervisory office over the federal judiciary cannot allow this resort to judicial legislation by the lower courts to go uncorrected.

The Little Placer Matter.

As typical of the way of the court below, note the Little Placer matter. In the period before October 10, 1939, your petitioner did not have and could not have had, knowledge or even "good cause to believe" in respect to overt acts which occurred after that particular date. The court below, using italics to atone for an erroneous statement asserts, that "the Appellant frankly conceded at the trial that while 'making an issue' of the incident as an 'overt act', it *could not prove any damage from it.*" The lack of harmony between this statement and the facts of the suit necessitate reference in some detail to the Record itself. The contest over the Little Placer Property is unique but typical of the way in which big interests prevent the small independent producer from expanding or from getting back into business when once forced out.

Your petitioner, in order to maintain itself in the borax business, on June 1, 1928, filed an application with the Government for a sodium prospecting permit upon the Little Placer. On August 1, 1928, respondent United States Borax Company, in an endeavor to eliminate petitioner from the borax field, filed a mineral application with the Government for the same property. The history of the activities of petitioner thereafter and the opposition that it met from respondents is set forth in the complaint commencing with paragraph 77 (R. p. 48) and extending through paragraph 80 (R. p. 53).

In paragraph 80, it is set forth that all of the actions and activities of defendants in contesting the Little Placer application of petitioner were performed and carried out for the purpose of preventing petitioner from securing a lease upon the Little Placer, with which lease petitioner would have been able again to enter into competition with respondents.

Paragraph 81 (R. p. 53) ties in all of the foregoing allegations of the complaint and alleges that all of the acts done and performed by the defendants were pursuant to and in furtherance of the conspiracy planned and the combinations charged, and for the purpose of controlling and dominating the mining, production and sale of borax in all its forms, *and with the further intent and purpose of injuring, destroying and removing petitioner as a competitor of defendants.*

The Circuit Court, entirely overlooking such portions of the Complaint, failed to pass upon, other than by inference, the important basic claim that the conspiracy alleged was a continuing conspiracy under the doctrine of *U. S.* v. *Kissel*, 218 U. S. 601.

It is alleged by petitioner that all of the acts and proceedings of respondents as set forth in the complaint were overt acts performed pursuant to the conspiracy in violation of the antitrust laws of the United States which existing for some time previously were formalized in the agree-

ment of 1929. It is contended by petitioner that the conspiracy of 1929 was a continuing conspiracy which did not terminate until the dismissal by the United States Borax Company of its action against the Secretary of the Interior which was subsequent to the 31st of July, 1944.

Is the Rule of the Continuing Conspiracy Applicable to a Civil Action?

In antitrust law the rule of the continuing conspiracy is applicable to criminal actions. In suits in equity brought by the government the rule of the continuing conspiracy is clearly recognized. The private cause of action for violation of the antitrust laws has its sanction in the identical provisions under which the government brings a criminal action or institutes a suit in equity. The private antitrust suit serves the same objectives as an action by the Department of Justice. Is the rule of the continuing conspiracy applicable to the private antitrust action? The whole rationale of antitrust law says "yes"; the court below has said "no". Here is a conflict in fundamental law which only this Court can resolve.

The case of *U. S.* v. *Kissel*, 218 U. S. 601 and many others lay down the rule definitely that in a criminal proceeding under the antitrust laws the conspiracy is to be considered as a continuing conspiracy in the face of a plea of the statute of limitations. So far as we have been able to ascertain, this point has never been passed upon by any of the Federal courts in a civil proceeding under Sec. 15, T. 15, and for that reason it is a case of first impression not only in the lower Federal courts but in this Court as well. We respectfully submit that in these days of growing antitrust litigation of all kinds, the range of applicability of this rule should be definitely settled by this Court. If the rule of the Kissel case had been followed herein the statute would not have begun to run until subsequent to the 31st day of July, 1944. The date of the last overt act of respondents,

is represented by the filing of the mandamus suit on September 1, 1944, (Civil Action No. 25789 D. C., D. C.) against the Secretary of the Interior by respondent United States Borax Company to compel him to issue a patent. (Complaint, paragraph 78, at R. p. 52). The complaint herein was filed on July 3, 1945.

This is a point of first impression and a decision thereon by this Court would settle definitely the law on the question. Its exposition demands a somewhat detailed statement of the facts.

In the activities surrounding the Little Placer, it is alleged that the application of respondent United States Borax Company for a mineral patent was denied on July 31, 1944, and that thereafter on September 1, 1944, such respondent filed an action in the District Court of the United States for the District of Columbia to enjoin the Secretary of the Interior from cancelling the Little Placer Mineral Entry. *This latter date was within one year prior to the commencement of this proceeding.* It is petitioner's contention that such last described activity was the last overt act of the conspiracy.

It is stated in the opinion of the Circuit Court (Note 13, R. p. 850), that during a colloquy between counsel for petitioner and the court, the latter asked what counsel alleged in the complaint to be the last overt act, to which counsel replied that it was the Little Placer claim, but that "We could not prove any damage from it but we make a live issue of that thing in the complaint." From this statement, the Circuit Court (R. p. 850) assumes the petitioner conceded that no damages could be proved as a result of the Little Placer activity. Such is not the fact, as an examination of the record will fully demonstrate. A statement of what actually occurred in court on the trial is set forth in R. pp. 234-242, a reading of which will show that the Little Placer act was urged in the complaint as an overt act performed pursuant to the conspiracy of 1929. The discussion between court and counsel did not in any

respect amount to an admission against petitioner, for such a statement did not constitute evidence of any kind and obviously only referred to the one act of respondent United States Borax Company in filing its petition against the Secretary of the Interior. No separate and distinct damage attributable to that single act was, or could, be isolated from the damage caused by the whole course of illegal conduct on the part of the respondents. The mere filing of such a petition did constitute an overt act, but its harmful impact came into play along with the other acts of respondents which made up the chain of unlawful conduct. This is clearly shown by the following ruling of the Court and the understanding of this rule by counsel on both sides. (R. p. 392), where the following occurred:

> "Mr. Harrison: May I ask your Honor to state to the Jury that any statements made on matters are not evidence?
>
> The Court: You mean the statements made by the counsel?
>
> Mr. Harrison: Yes, statements made by counsel.
>
> The Court: I thought I covered that.
>
> Mr. Carr: Yes.
>
> The Court: I spoke of the arguments by the Court and counsel and I meant to include the statements of counsel as well as the statements of the Court. Neither of them are evidence in the case, ladies and gentlemen."

That it was never the intent to waive any damages provable under the facts alleged in the complaint or which might have been produced on the trial, is shown conclusively by the following additional colloquy between the Court and counsel for petitioner R. pp. 785-6:

> "The Court: You mean you could not show any damage from the 1929 conspiracy?
>
> Mr. Carr: Under the 1929 conspiracy which we stand on here.

Mr. Harrison: He does not plead any damage under the 1929 conspiracy.

Mr. Carr: Oh, yes, we do. We plead lots of damage.

The Court: Maybe I misunderstood what you just said. I gathered from what you said that you would not be able to show any damage from the 1929 conspiracy.

Mr. Carr: *No, I said if we could not. I do not say we cannot, because we believe we can.* But the overt acts all go to the measure and extent of the damage resulting from the basic conspiracy of 1929. If we cannot, when it comes to the main trial, prove that those damages were incurred as the result of the 1929 conspiracy, of course we cannot recover. But that is not the question here. The question here is, whether or not the statute has run as to the 1929 conspiracy, and nothing else is before this court at this time."

Irrespective of what might have been stated by petitioner's counsel, the result adopted by the Circuit Court was an error; for, even taking such statement at its face value and giving it all the force attributed to it by the Circuit Court, it nevertheless was an erroneous statement so far as the law is concerned. In such situations as the Little Placer damages for prospective or speculative profits *are recoverable* (*Story Parchment Paper Co.* v. *Patterson*, 282 U.S. 555). And it was error for the Circuit Court to base its decision in the Little Placer matter on an erroneous interpretation of the law. Whether damages could be recovered as the result of the Little Placer activities could only be determined upon the trial of the case on the merits.

The Circuit Court implies that an overt act is not such unless it, in itself, causes damage. This is not a correct interpretation of the law, for an overt act need not necessarily be productive of damage in itself; it can be an overt act without specifically inflicting damage; for instance, the carrying of a letter from one conspirator to his co-conspirator could constitute an overt act and yet no direct or provable damage might result from the mere inert act of

carrying such a letter. Such is the rule laid down by the Ninth Circuit itself in *Marino* v. *United States,* 91 Fed. 691, pp. 694-5, where it is said:

> "The crime is completed when an overt act affecting the object of the conspiracy is done by at least one of the conspirators. An overt act is something apart from the conspiracy, and is 'an act to effect the object of the conspiracy'. Joplin Mercantile Co. v. U. S., 236 U. S. 531, 535, 35 S. Ct. 291, 293, 59 L. Ed. 705. It need neither be a criminal act nor the very crime that is the object of the conspiracy. It must, however, accompany or follow the agreement, and must be done in furtherance of the object of it."

The same rule was announced by the Ninth Circuit in the recent case of *Nye & Nissen* v. *U. S.,* 168 Fed. (2d) 846. That case involved a conspiracy by which the defendants *planned* to act and where no damage or actual activities were shown. Such *planning* to act was held to constitute an overt act even though not actually fully carried out.

The Court Below Ignored Burnham's Uncontradicted Testimony.

The Court of Appeals for the Ninth Circuit ignored the testimony of Mr. Burnham, president of petitioner (R. p. 356), that during the time set forth in the pre-trial order, namely, May 17, 1929, and October 10, 1939, he did not know that petitioner had been damaged by acts of respondents in violation of the antitrust laws; that he had made diligent efforts at discovery; that at times he believed that he had been driven from, and prevented from returning to, the borax business by acts of the respondents in violation of the antitrust laws. These short periods of belief founded on suspicion caused him to make investigations which turned out to be fruitless. Such fruitless investigations led to long periods of disbelief. Not until late in 1944 did he succeed in obtaining knowledge of the conspiracy and of the course of conduct by which it was made, and was still

being made, successful (R. p. 690). The court below ignored all the detailed statements of Mr. Burnham, such as that during July and August of 1928, he had no knowledge that the respondents were violating the antitrust laws; R. pp. 750-751, that he first acquired the knowledge of the 1929 agreement in the fall of 1944; R. p. 755, that prior to the fall of 1944, he did not have evidence of the existence of such a conspiracy; and R. pp. 760-761, that never prior to the fall of 1944 had he heard of any agreement of respondents in reference to price cuts or monopolization of the borax industry.

Intervening Reason for Granting the Writ.

Since the hearing on the appeal before the Court of Appeals for the Ninth Circuit, *additional evidence of fraud on the part of the United States Borax Company has been found.* Your petitioner has discovered, in respect to the Kramer Borax District, that: (1) The prospectors who located the mining claims concealed from the Government the information that they had found sodium borate; (2) Employees of one of the members of the Borax Cartel helped them conceal the information; (3) The U. S. Mineral Surveyor who surveyed the claim and who was a brother of the Field Engineer for one of the members of the Cartel, signed a sworn affidavit that the locators discovery drill penetrated colemanite at a depth of 375 to 425 feet, whereas in truth, it penetrated sodium borate at that depth in the drill hole; (4) Two other employees of the Borax Cartel signed sworn affidavits at the time the locators were making application for patent to the land, concealing the fact that the discovery drill hole disclosed sodium borate. Their intent was to keep all independents, including Burnham Chemical Company, from securing access to this new source of sodium borate and thus to block independents, including Burnham Chemical Company, from the industry.

When your petitioner applied for the Little Placer property in the Kramer District under the leasing law, employees of the United States Borax Company, in line with the conspiracy to keep out competition filed a false affidavit for the purpose of blocking petitioners efforts to acquire the Little Placer. All of this information is now a matter of documentary record in the files of the Department of the Interior; it was, however, not available to petitioner, at the time of the trial and of the hearing by the Circuit Court for the Ninth Circuit.

Substantial Reasons for Granting the Writ.

If the issues raised here were of no more than private concern, justice would demand that your petitioner be accorded a hearing on the law and the facts, which the courts below have failed to accord it. But petitioner is convinced that its cause here is the cause of the independent business unit which dares to enter a domain of the economy which a small number of large corporations, acting in concert, hold to be their exclusive proprietary province. For these compelling reasons it insists that the writ should be granted.

1. In times like these, the Congress has decreed that the antitrust laws shall be the instrument for holding the economy to its lawful pattern. The maintenance of competition is the effective check upon the concentration of economic wealth and power; likewise the right to a trade is the civil liberty depended upon to release creative energies and to keep alive the dynamic urge in the industrial system. As pointed out above, the vitality of the antitrust laws is now being threatened by a technique of ingenious moves by defendants in antitrust suits designed to keep the question of the merits from ever being reached. The lower courts, none too well versed in the antitrust laws, are yielding before this strategy. The current case, employing the statute of limitations is a representative move in this strategy. While this court should give full effect to the law, it should not

allow legitimate devices, such as the statute of limitations, to be abused with a consequent impairment of the antitrust code upon which the small business unit must rely for its very existence.

2. The decisions of the two courts below constitute judicial legislation. Not only have they made state limitations on actions integral parts of the federal antitrust laws; but, without warrant from the Congress, expressed or implied, they have made the choice between such statutes, the times at which they begin to run, and the circumstances under which they are tolled, matters of state concern or even—as here—arbitrarily subject to the whims of the lower courts. In the instant case discovery, whose sole function is to provide the litigant with the knowledge wherewith to prepare his cause of action, is degraded into mere uninformed belief. Such a ruling is not only judicial legislation, but judicial legislation which in effect nullifies the expressed will of the Congress.

3. The holding of the Court of Appeals, stripped of all ancillary questions and rulings, amounts to this: That, if a small number of large concerns, seeking to establish and to maintain their exclusive dominion over an area of the economy, can keep the evidence of their conspiracy secret until, as literally applied the statute of limitations has run, the corporations acting in concert win immunity from the antitrust laws. This court has repeatedly insisted that its measures of relief shall neutralize the extention and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about. *Standard Oil* v. *U. S.*, 221 U. S. 1, 31 S. Ct. 502, 523. It has repeatedly declared that "Those who violate the (Sherman) Act may not reap the benefit of their violations or avoid the undoing of their unlawful project on the plea of hardship or inconvenience". *U. S.* v. *Crescent Amusement Co.*, 323 U. S. 173, 189; 65 S. Ct. 254, 262. If, as against such holdings, this honorable Court is now per-

suaded that a compact group which succeeds in keeping knowledge of its conspiracy secret until the statute of limitations has run has thereby become immune to the antitrust laws and may keep the fruits of its illegal conduct, it should frankly say so in no uncertain terms.

The Writ and Public Policy.

To deny your petitioner a writ of certiorari is to frustrate the purposes of Congress in enacting the antitrust Laws.

This honorable Court should take official notice of the fact that the last two Presidents of the United States have urged that the antitrust laws be made more effective and the judiciary without benefit of further legislation can, and is in duty bound to interpret the law to make them more effective and thereby carry out the will of the Congress given eloquent expression by its Executives.

In his monopoly speech before Congress on April 29, 1938, President Franklin D. Roosevelt called for "a thorough study of concentration of economic power in American Industry and the effect of that concentration upon the decline of competition." The President stated that there was a growing "concentration of private power without equal in history" and he declared that this power when its strength exceeded that of the Government was 'fascism' ". The President warned the Nation against "Fascism ownership of Government by an individual, by a group, or by any other controlling power." (R. p. 662)

The President went on and stated:

> "The year 1929 was a banner year for distribution of stock ownership, but in that year three-tenths of 1 percent of our population received 78 percent of the dividends reported by individuals. This has roughly the same effect as if, out of every 300 persons in our population, one person received 78 cents out of every dollar of corporate dividends, while the 299 persons divided up the other 22 cents between them" (Defendant's Exhibit AH).

Statistics of the Bureau of Internal Revenue reveal the following amazing figures for 1935:

> "Ownership of corporate assets: Of all corporations reporting from every part of the Nation, one-tenth of 1 percent of them owned 52 percent of the assets of all of them . . . also, one-tenth of 1 percent of them earned 50 percent of the net income of all of them.
>
> " . . . business monopoly in America paralyses the system of free enterprise on which it is grafted, and is as fatal to those who manipulate it as to the people who suffer beneath its imposition . . . "

In President Truman's recent message to Congress on January 5, 1949, he stated, among other things, as follows:

> "Small business is losing ground to growing monopoly . . .
>
> "We can keep our present prosperity and increase it only if free enterprise and free Government work together to that end.
>
> "If our free enterprise economy is to be strengthened and healthy, we must reinvigorate the forces of competition. We must assure small business the freedom and opportunity to grow and prosper. To this purpose, we should strengthen our antitrust laws by closing those loopholes that permit monopolistic mergers and consolidations . . .
>
> "We stand at the opening of an era which can mean either great achievement or terrible catastrophe for ourselves and for all mankind.
>
> "The strength of our nation must continue to be used in the interest of all our people rather than the privileged few."

Burnham Chemical Company, the petitioner, is a corporation with approximately 7,000 stockholders who are American Citizens. Respondents are corporations controlled (with one exception, viz., American Potash and Chemical Corporation) by Borax Consolidated, Ltd., a British Corporation. Respondents are the largest producers, refiners and distributors of borax in the world and own and control by fee title or lease practically all of the

borax fields in the United States with the exception of some ten acres known and described as the Little Placer.

Summary.

The three fundamental questions are—

(1) Can one institute a cause of action grounded in the antitrust law on short periods of belief of violation of the antitrust law when such short periods of belief are founded on mere suspicion?

(2) Can those who conspire to injure another in violation of the antitrust laws be exempt from paying damages, if they keep the knowledge of their conspiracy away from their victim long enough?

(3) If a combination in restraint of trade blocks an independent from getting access to a new source of raw material for 16 years, then at the end of that time, it is found that its activities have been illegal, shall the statute of limitations bar the victimized independent from bringing an antitrust suit?

CONCLUSION.

For these reasons your petitioner humbly requests this honorable court to reconsider its former decision, to review again the matters now and previously brought to its attention and to grant a writ of certiorari in the above entitled cause addressed to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

STERLING CARR,
Attorney for Petitioner.

1 Montgomery Street,
San Francisco, Calif.,
April 1, 1949.